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NO. 531

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WYNDHAM ASSOCIATES, *et al.*,
Petitioners,

v.

DAVID C. BINTLIFF, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT THE CHASE MANHATTAN BANK, N.A. IN OPPOSITION TO CERTIORARI

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3A Moore, *Federal Practice* ¶ 21.05 at 2911-12 (2d ed. 1968) ---- 7

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 398 F.2d 614 and is printed as Appendix A to the petition. The opinion of the District Court is unreported and is printed as Appendix B to the petition.*

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* References followed by "J" are to the joint appendix filed in the Court of Appeals; references followed by "a" are to the appendices to the petition.

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion in severing, pursuant to Rule 21 of the Federal Rules of Civil Procedure, claims asserted against certain defendants which are only indirectly connected to claims asserted against other defendants?

2. Did the District Court abuse its discretion in transferring an action, pursuant to 28 U.S.C. § 1404(a), after having severed claims asserted against defendants as to which transfer would have been improper?

STATEMENT OF THE CASE

Petitioners seek review of judgments of the Court of Appeals for the Second Circuit which affirmed orders of the District Court for the Southern District of New York severing tangential claims asserted against two peripheral defendants pursuant to Rule 21 of the Federal Rules and transferring petitioners' principal claims, asserted against six other defendants, to the District Court for the Southern District of Texas, pursuant to 28 U.S.C. § 1404(a).

The Allegations of the Complaints

Petitioners brought these class actions* on behalf of themselves and other purchasers of stock of Westec Corporation ("Westec"). Westec stock was publicly traded

* Petitioners are plaintiffs in two separate class actions, *Wyndham Associates* v. *Bintliff* (Dkt. No. 31976) and *Friedman* v. *Bintliff* (Dkt. No. 31977). The allegations of the complaints are substantially the same, except that The Chase Manhattan Bank was not named as a defendant in the *Wyndham* action. The Court of Appeals consolidated the appeals in both cases. Unless the context indicates otherwise, references herein are to the *Friedman* complaint.

until August 1966 when trading was suspended. Since then, Westec and its shareholders have found many champions, and the affairs of Westec and the activities of its management and others (including the principal defendants named here) are being unraveled in various actions and proceedings now pending in the Southern District of Texas.

The complaint charges that defendant Bintliff, a Texas financier and owner of a large number of Westec shares, engaged in a scheme to manipulate the price of Westec stock on the American Stock Exchange ("Amex"), in violation of the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 (7J-11J).

Bintliff's scheme was "aided and abetted," the complaint charges, by the activities of the seven other defendants. Two of these defendants, McNeese and Tybor, are Texas associates of Bintliff (5J). Moroney, Beissner & Co., Inc. ("Moroney"), A. G. Becker & Co., Inc. ("Becker") and Goodkind, Neufeld & Co., Inc. are stock brokerage firms charged with, among other things, making false and misleading statements with respect to Westec, with buying and selling for Bintliff Westec stock for the purpose of manipulating its price, and with effecting transactions in Westec stock so as to stabilize its price (11J-12J).

The remaining defendants, The Chase Manhattan Bank, N.A. ("Chase") and Amex, are also charged with "aiding and abetting" Bintliff. However, Amex is charged only with failing to prevent Bintliff's allegedly unlawful conduct and with failing to exercise properly its supervisory responsibilities, although it "knew or should have known" of Bintliff's alleged unlawful activities (13J-15J). Sim-

ilarly, it is alleged that Chase "knew or should have known" of Bintliff's alleged scheme and that it aided and abetted its alleged consummation by virtue of its role as Westec's co-transfer agent and co-registrar. In addition, Chase is charged with having failed to report Bintliff's conduct "to the proper authorities" (13a). It is apparent, as the Court of Appeals found, that the conduct with which Chase and Amex are charged is "only indirectly connected to the manipulations which form the main subject matter of the action" (11a).

THE PROCEEDINGS BELOW

Petitioners try to obscure the critical fact that these actions come at the tail end of a long line of actions involving alleged manipulations of the price of Westec stock. It is significant that the *Wyndham* action was not commenced until after ten other representative shareholder actions, each involving charges of manipulation of the market price of Westec, had been transferred by Judge Edward Weinfeld from New York to the Southern District of Texas. Mindful of the various Westec actions (including representative actions brought, as are these actions, on behalf of Westec shareholders) and other proceedings already underway in the Texas Court, Judge Weinfeld concluded that retention of the cases in New York would only "result in wasteful and unnecessary duplication." *Schneider* v. *Sears*, 265 F.Supp. 257, 267 (S.D.N.Y. 1967).

After the *Wyndham* complaint had been filed (2J), Judge Edmund Palmieri transferred to the Texas Court still another New York action involving alleged market rigging in Westec stock. *Cosmos Bank* v. *Bintliff*, [1966-67

Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,969 (S.D.N.Y. 1967) (8a).

In August 1967, Amex made a motion in the *Wyndham* action for an order severing the claims against it from those advanced as to other defendants (2J, 98J); thereafter, defendants Bintliff, McNeese, Tybor, Becker and Moroney all filed motions seeking a transfer to the District Court in Texas. It was not until this point, after the respective motions had been made, that petitioners filed the *Friedman* complaint (2J), adding Chase to petitioners' roster of alleged aiders and abettors.

The *Friedman* complaint correctly alleged that Chase is a national banking association established in the Southern District of New York (5J-6J) and as such is subject to the venue limitations of the National Banking Act, 12 U.S.C. § 94 (Rev. Stat. § 5198 (1878)). These circumstances surrounding the last minute joinder of Chase led the District Court to comment (22a):

> "With plaintiff's apparent familiarity with the affairs of WESTEC evidenced by the papers before us, CHASE's alleged contacts with WESTEC and BINTLIFF now alleged for the first time in the FRIEDMAN suit and the naming of CHASE as a defendant in that complaint suggest the possibility that the venue provisions of the National Banking Act, Title 12 U.S.C. Sec. 94 (Rev. Stat. Section 5198 [1878]) might well have been considered."

Chase opposed the motions of other defendants insofar as they sought a transfer with respect to Chase, asserting the venue provisions of section 94 of the National Banking Act. In the alternative, Chase requested a severance.

The District Court severed the claims asserted against Chase and Amex, directed that amended complaints be filed, denied the motions to transfer as to Chase and Amex, and granted the motions to transfer as to the six other defendants. The Court of Appeals unanimously affirmed the District Court's orders in all respects.

ARGUMENT

I.

The District Court properly exercised its discretion in severing the claims asserted against Chase and Amex and in transferring the action after severance.

The fundamental issue raised by the petition is whether severance as to Chase and Amex was proper under Rule 21 of the Federal Rules and, as to that issue, we submit that the Court of Appeals' decision does not warrant review by this Court. The Rule provides that "Any claim against a party may be severed and proceeded with separately." The Court of Appeals squarely held that severance of any claim, even absent a finding of improper joinder, is permissible where there are sufficient other reasons for ordering a severance (10a). This common sense approach to complex multiparty litigation makes the most of the Federal Rules' flexibility and has been endorsed by a number of courts. *E.g., Sporia* v. *Pennsylvania Greyhound Lines, Inc.*, 143 F.2d 105 (3d Cir. 1944); *General Elec. Credit Corp.* v. *James Talcott, Inc.*, 271 F.Supp. 699 (S.D.N.Y. 1966); *Leesona Corp.* v. *Cotwool Mfg. Corp.*, 204 F.Supp. 139 (W.D.S.C.), *appeal dismissed*, 308 F.2d 895

(4th Cir. 1962). See also 3A Moore, *Federal Practice* ¶ 21.05 at 2911-12 (2d ed. 1968); 1 Barron & Holtzoff, *Federal Practice and Procedure* § 86.2 at 284 (1967 Supp.). Petitioners are unable to point to any contrary ruling either in this Court or in any other, much less to a significant split of authority on the point.

There can be no question that the District Court properly exercised its discretion in directing a severance as to Chase and Amex. The claims asserted against each are remote and peripheral to those asserted against the principal alleged wrongdoer, Bintliff, his Texas colleagues and the three brokerage firms which are alleged to have played an active and direct part in the manipulation. Chase, by way of contrast, is brought into the action as a result of its ministerial role as Westec's co-transfer agent and co-registrar. Apparently Chase is to be charged in these capacities with ascertaining whether stock which is presented for transfer constitutes control stock under the Securities Act of 1933 and whether a registration statement has been filed. On its face, the claim asserted against Chase, like those asserted against Amex, is so remotely connected with those advanced against the principal defendants that the order of severance was fully warranted.*

Moreover, even if Chase's connection with the alleged scheme of Bintliff were not so tenuous and unrelated to

* Apparently anticipating Chase's objection to being joined in the same action with the principal defendants, petitioners attempted to tie it into Westec's affairs by asserting that it was Westec's principal banker, the New York correspondent of the Bank of the Southwest (with which Bintliff, Tybor and McNeese were associated) and a principal banker for Bintliff (6J). All this is window dressing since Chase's only alleged involvement with Bintliff's manipulations occurred in connection with its activities as co-transfer agent and co-registrar.

the main charges, severance so as to permit transfer with respect to other defendants would be equally appropriate. It is settled that Chase, as a national banking association, is not subject to suit (absent its consent) in a forum outside the Southern District of New York, where it is "established" for purposes of the venue limitation of section 94 of the National Banking Act. See, *e.g.*, *Michigan Nat'l Bank* v. *Robertson*, 372 U.S. 591 (1963); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963); *Cope* v. *Anderson*, 331 U.S. 461, 467 (1947); *First Nat'l Bank* v. *Morgan*, 132 U.S. 141, 145 (1889). Thus, Chase cannot be transferred to a forum in which it could not be sued in the first instance. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

Furthermore, the parties do not challenge the holdings of the courts below (9a, 28a) that the mandatory effect of section 94 is in no way diminished by the venue provisions of the Securities Act of 1933 (15 U.S.C. § 77v(a)) or the Securities Exchange Act of 1934 (15 U.S.C. § 78aa). See, *e.g.*, *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.*, 394 F.2d 300 (2d Cir. 1968), *cert. denied*, 37 U.S.L.W. 3135 (U. S. Oct. 14, 1968) (No. 143); *General Elec. Credit Corp.* v. *James Talcott, Inc.*, 271 F.Supp. 699 (S.D.N.Y. 1966).

Petitioners exalt the liberal joinder provisions of the Federal Rules and the broad venue provisions of the securities acts to the exclusion of all other considerations. They argue, in effect, that plaintiffs in multiparty actions involving the securities laws have the absolute right to dictate where the action is to be tried. The defect in petitioners' reasoning, as the Court of Appeals observed, is that it would permit plaintiffs to deprive the other parties,

witnesses and the courts of the salutary benefits of the transfer statute simply by joining a defendant as to which transfer would be improper. This is the kind of forum shopping which the transfer statute was in part designed to protect against.

The District Court's orders, transferring the action after severance of Chase and Amex, reflect a proper exercise of discretion which, particularly in these unusual circumstances, was plainly correct. As required by section 1404(a), transfer will best accommodate the convenience of the parties and witnesses and is clearly in the interest of justice.

The most striking aspect of this case is its duplication of claims which have been asserted and which were pending on behalf of petitioners before this action was commenced. The courts below took notice not only of the representative actions which had already been transferred from New York to Texas but also of the many actions which had been brought in the first instance in Texas on behalf of Westec and its shareholders. And, we are advised that subsequent to the Court of Appeals' decision, still another action has been commenced in the Texas Court. Included among the 93 individuals and firms named as defendants in this latest action, brought by the Westec Trustee on behalf of Westec and on behalf of Westec shareholders, are Bintliff and all of the broker defendants in this action; the claims advanced duplicate, in substance, those lodged by petitioners. Wall Street Journal, Aug. 26, 1968, p. 6, col. 2. It is thus hard to imagine any group of shareholders whose interests are as well protected by so many representatives, both public and private, as are those of Westec's

shareholders. In view of these circumstances, petitioners' protestations that the transfer orders may deprive them of their day in court (Petition, p. 20) cannot be taken seriously. Rather than depriving petitioners of the opportunity to assert their claims, transfer to Texas will effect real economies which will benefit both the members of the class which petitioners represent and those principal defendants who are already deeply involved as parties and witnesses in the Texas litigations and investigations (50J-55J).

As the Court of Appeals recognized (11a-12a), section 1404(a) requires the district judge to consider factors other than simply the number of lawsuits which may result after the transfer and the fact that parties may have to rely in part on deposition testimony at the trial rather than that of live witnesses. These other factors are compelling in this instance because of the various related proceedings pending in Texas. The Court of Appeals correctly concluded (12a):

> "There is a strong policy favoring the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently, duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses, and inconsistent results can be avoided."

Finally, the unique advantages afforded to the litigants and witnesses by reason of the appointment of Judge Hannay to supervise the Westec reorganization proceeding and related cases, including shareholders' derivative actions involving alleged manipulation of the price of Westec stock, should not be underestimated. In this connection, the Court

of Appeals quoted from the decision in *Cosmos Bank* v. *Bintliff*, [1966-67 Transfer Binder] CCH Fed. Sec. L. Rep. ¶91, 969 (S.D.N.Y. 1967), where Judge Palmieri pointed out that Judge Hannay's "familiarity with the legal problems, attorneys, witnesses, and exhibits relating to the affairs of Westec constitutes a precious asset, increasing in value with the passage of time, and which will undoubtedly lighten the burden of litigants and courts alike" (13a).

Conclusion

In construing the transfer statute, the venue provisions of the securities laws and the Federal Rules' standards for severance, the courts below have applied a practical approach in accommodating the interests of all parties. The petition fails to present any issues which merit review by this Court and should be denied.

Respectfully submitted,

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